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# The **Freedom** of Information Act

Made Simple.

# Legislative Intent

A.C.A. § 25-19-102

- to ensure that electors are **fully advised** of the activities and decisions of their public officials
- liberally construed in favor of **openness**
- exceptions are narrowly construed

Made Simple.



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# FOIA **Overview**—3 Step Approach

- Step 1: Is entity covered?



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# FOIA **Overview**—3 Step Approach

- Step 1: Is entity covered?
- Step 2: Is the record/meeting covered?



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# FOIA **Overview**—3 Step Approach

- Step 1: Is entity covered?
- Step 2: Is the record/meeting covered?
- Step 3: Are there any exemptions?



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## Step 1: Is the entity covered?

- All **government** entities



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## Step 1: Is the entity covered?

- All government entities
- Some **private** entities
  - Public funding **+** intertwining



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# Step 1: Is the entity covered?

- All government entities
- Some **private** entities
  - Public funding + intertwining
  - Examples
    - Busing
    - Buildings



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# The Freedom of Information Act

Step 2: Is the record covered?



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# The **Freedom** of Information Act

## Definition & Rule

Step 2: Is the record covered?



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# Step 2: Is the *record* covered?

- What is a “public record”?
  - (1) Writings, sounds, electronic info, or videos that



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# Step 2: Is the *record* covered?

- What is a “public record”?
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  - (3) that constitute a record of the performance or lack of performance of official functions



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# Step 2: Is the *record* covered?

- What is a “public record”?
  - (1) Writings, sounds, electronic info, or videos that
  - (2) are kept
  - (3) that constitute a record of the performance or lack of performance of official functions
- Examples: emails, job applications, personnel files, some job evaluations



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# Public Records (con't)—How do you know?

- The content
- The **presumption**:
  - (1) maintained in public offices or by public employees
  - (2) within the scope of their employment



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# Public Records (con't)

- The content
- The presumption:
  - (1) maintained in public offices or by public employees
  - (2) within the scope of their employment
- Rebutting the presumption
  - record doesn't reflect the "performance or lack of performance of official functions."
  - Content based

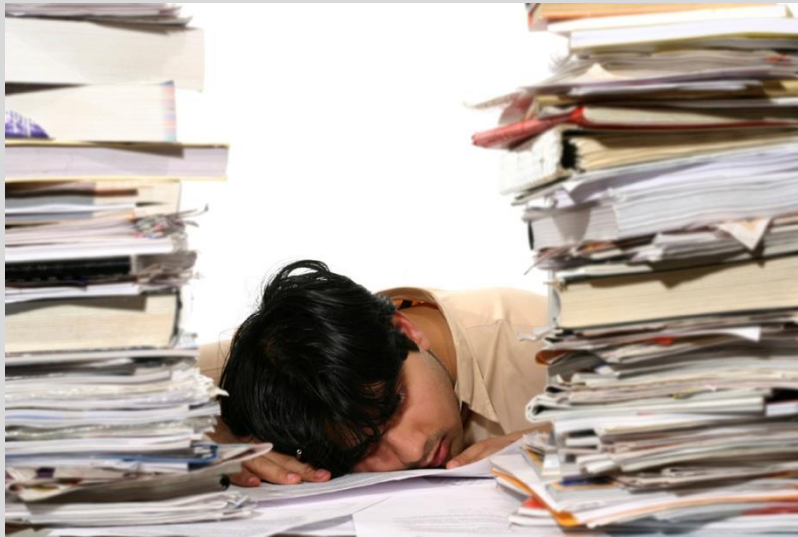


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# Step 2: Is the *record* covered?

General **rule**:

All “public records” must be **disclosed** unless exempt



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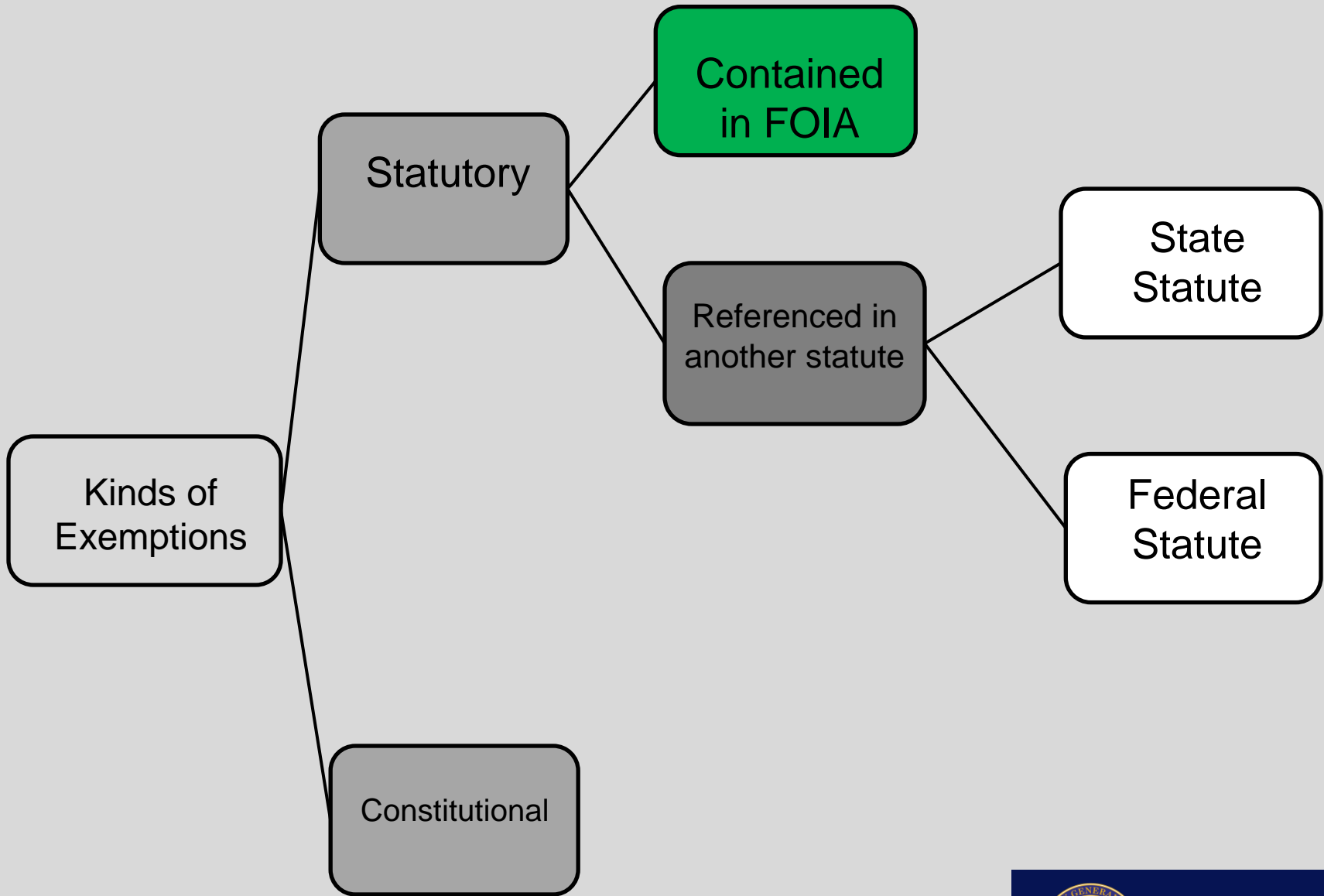


# The **Freedom** of Information Act

Step 3: Records Exemptions.



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## Step 3: *Some* records exceptions

***Personnel records***

&

***Employee evaluation records***



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# Step 3: *Some* records exceptions

## *Personnel* records

- Definition: virtually all records pertaining to the individual employee that aren't evaluation records



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# Step 3: *Some* records exceptions

## *Personnel* records

- Definition: virtually all records pertaining to the individual employee that aren't evaluation records
- Stance: "It must be disclosed, unless...."



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# Step 3: *Some* records exceptions

## *Personnel* records

- Definition: virtually all records pertaining to the individual employee that aren't evaluation records
- Stance: "It must be disclosed, unless...."
- Test: unless doing so constitutes a "clearly unwarranted invasion of personal privacy"



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# Personnel Records - Commonly **Exempted** Items

- Social Security numbers
- Medical info
- Insurance, pension & benefit info
- Tax info & withholdings
- Personnel numbers
- Personal contact info (home/cell numbers; home addresses; personal email addresses)
- Date of birth
- Marital status and info on dependents



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# Personnel Records - Common Items **Open** to Inspection

- Name
- Salary info
- Contracts
- Employment applications
- Resumes
- Educational background
- Work History
- Leave Records
- Letters of recommendation



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## ***Step 3: Some records exceptions***

### ***Evaluation records***

- Definition: any record created by (or at the behest of) employer to evaluate an employee



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# ***Step 3: Some records exceptions***

## ***Evaluation records***

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# Step 3: Some records exceptions

## **Evaluation** records

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- Stance: “Must be withheld, unless...”
- Test: unless...
  - Suspended or fired (level of discipline)
  - Final administrative resolution (finality)
  - The records formed a basis for the decision (relevance); and
  - There’s a compelling public interest in the disclosure (compelling public interest).



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# Compelling Public Interest

- Factors to consider when determining that a compelling public interest is present:
  - The nature of the infraction that lead to suspension or termination, with particular concern as to whether violations of the public trust or gross incompetence are involved;
  - The existence of a public controversy related to the agency and its employees;
  - The employee's position within the agency.



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# Mixed Records

- A record is “mixed” when it can be classified as:
  - More than one person’s evaluation,
  - More than one person’s personnel record, or
  - At least one person’s evaluation and at least one person’s personnel record.



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# Mixed Records

- First step: Classify the records.
- Second Step: Apply the relevant test for disclosure and make any necessary redactions.

Note: Most complaints against public employees are either the **personnel records** or **employee-evaluation records** of the person being complained about.

A complaint *by* a public employee is also usually a **personnel record** of the complainant.



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# How to **make** a FOIA Request

- **Mode**
  - Any method will do
- **Specificity**
  - Detailed enough to locate the records with “reasonable effort.”
- **Medium**
  - Any medium in which the record exists or is “readily available.”



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# 4 Steps to **Evaluate** the Request



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# 4 Steps to **Evaluate** the Request

- Step 1: What's requested?
- Step 2: How long do you have to respond?
- Step 3: Evaluate the record(s)
- Step 4: Prep and send



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# Evaluating the Request

- **Step 1:** What's requested?
  - Is it detailed enough?
    - If not, get clarification.
    - Is it a personnel record or employee evals?
  - Who's the custodian?



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# Personnel/Evaluation Records Compliance

- Notice Requirements
  - Notify employee and requester within **24 hours** of the agency decision
  - Overnight mail notice is required if other notice fails
  - The requester, custodian or subject may request an opinion from the **Attorney General**
  - Redact any exempt information and provide the records



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# Evaluating the Request

- **Step 2:** How long do you have to respond?
  - **3 days** if in storage or active use
  - Otherwise: **immediately**



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# Evaluating the Request

- **Step 3:** Evaluate the record
  - Public record?
  - Exemptions?
  - Redactions? (wield the Sharpie)



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# Personnel/Evaluation Records **Compliance**

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# Responding to the Request

- **Step 4:** Prep & send the record(s)
  - Open for inspection if requested
- Making the copies
  - The requester can *require* copies.
- **Charging** for copies?
  - Only “actual costs of reproduction”
  - That includes mailing or faxing
  - Doesn’t include employee time
  - \$25 in advance
  - Itemize the charges



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# The **Freedom** of Information Act

Step 2: Is the meeting covered?



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Identifying  
a meeting

- definition
- types

Requirements

- notice requirements
- attendance

Step 2: Is the meeting covered?



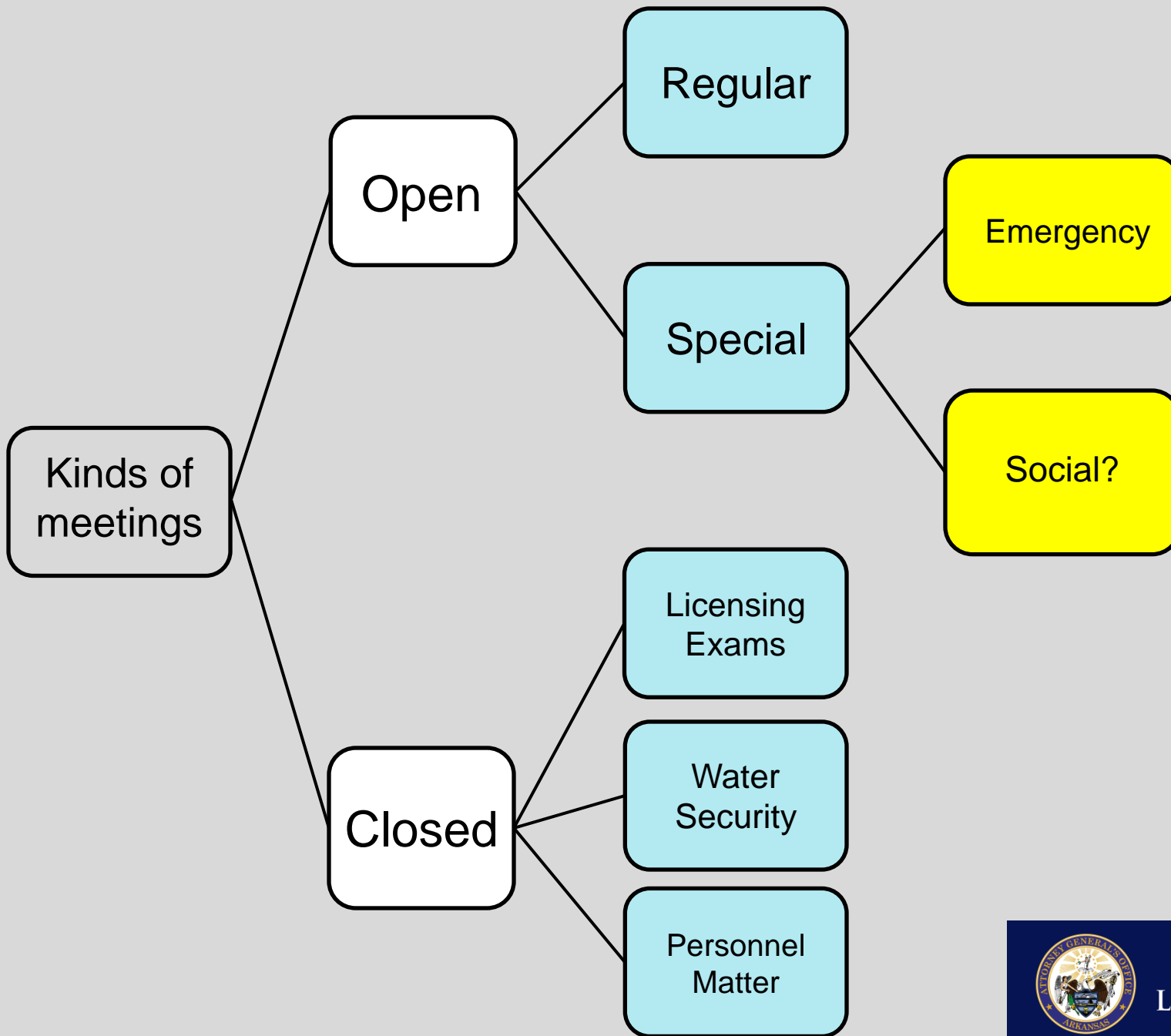
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# What is a “meeting”?—definition

- A.C.A. 25-19-106(a): “all meetings, formal or informal, special or regular, of the governing bodies of all municipalities [and] counties...shall be public meetings.”
  - In other words: “All meetings are public meetings.”
  - But what’s a ‘meeting’?
- What’s a governing body?
  - It’s a body that can make decisions



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# How many make a meeting?

- no quorum required
- any particular number?
- no polling or secret telephone conferences



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# Social Gatherings/Conferences?



- Not a “meeting” if discussion of government business at the social gathering is **incidental** and intermittent (Op.95-020)
- Probably not a “meeting” if **governing body** has no control over the conference, function, or proceeding (Op. 94-131)



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# Are **e-mails** meetings? (Op. 2005-166)

- Usually not
- But they could be—depends on all the facts



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# What if the meeting is covered?

## (Part 1)

### Notice Requirements

- Regular Meetings:
  - (1) time and place must be given to
  - (2) anyone who asks
- Special/Emergency Meetings:
  - (1) time, place and date – 2 hours in advance
  - (2) to news media
    - (a) in the county where the meeting's held, and
    - (b) located elsewhere that cover the regular meetings
  - (3) that have asked to be notified



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# What if the meeting is covered?

## (Part 2)

- **Attendance** not participation at meetings
- But see A.C.A. § 14-14-109(b), requiring county boards to afford citizens “a reasonable opportunity to participate prior to the final decision.”
- Public must be able to see how each individual member voted.



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# The **Freedom** of Information Act

Step 3: Meetings Exemptions.



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## Kinds of Exceptions

- licensing exams
- water security
- personnel matters

## Procedure for using an exception

- notice
- announcement
- limited attendance

## Step 3: Meetings Exemptions.



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# Personnel Matters

- **only** for hiring, firing, appointing, promoting, demoting, disciplining, or resigning of public officer or employee



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# Exec. Session—**Procedure**

- Notice requirements still apply.
- Must announce specific purpose before going in.
- Must vote in **public** afterward or action is void.
- Other specific state laws may allow private meetings



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# Exec. Session—**Attendance**

- Persons who can attend **by right**:  
all members of the governing body
- Persons who can attend **by invitation**:
  - interviewee for top administrative position
  - the top administrator, immediate supervisor, and employee
- Persons who **cannot attend**:  
Everyone else, including attorneys



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# Enforcement

- Action is **void** if no public vote
- Noncompliance in other respects renders action **voidable**  
Court will only invalidate the action when:
  - Plaintiff has given the body a chance to hold a meeting that conforms;
  - Remedy is sought to vindicate public as opposed to private interest;
  - The FOIA violation was substantial; and
  - The defendant *knowingly* violated the Act .



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# Enforcement



Civil Suits



Class "C" Misdemeanor



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# Guides to Interpretation

- Freedom of Information Handbook (18th ed.)
- Watkins, Peltz-Steele & Steinbuch, *Arkansas Freedom of Information Act* (Arkansas Law Press, 6th ed., 2017)
- Attorney General's website: [ArkansasAG.gov](http://ArkansasAG.gov)



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